

U.S. SENDING STATE OFFICE FOR ITALY INSTRUCTION 5820.1D

Subj: OPERATING PROCEDURES IN ITALY UNDER ARTICLE VII, NATO
STATUS OF FORCES AGREEMENT

Ref: (a) DOD Directive 5525.1, "Status of Forces Policy and Information," August 7, 1979(incorporating through Change 2, July 2, 1997)
(b) NATO Status of Forces Agreement ("NATO SOFA"), June 19, 1951, 4 UST 1792, TIAS 2846, 199 UNTS 67
(c) Memorandum of Understanding Between the Ministry of Defense of the Republic of Italy and the Department of Defense of the United States of America Concerning Use of Installations/Infrastructure by U.S. Forces in Italy, 2 Feb 1995 (Shell Agreement)
(d) CINCUSNAVEURINST 5820.8H/USAFE Reg 110-1/USAREUR Reg 550-50, "Exercise of Foreign Criminal Jurisdiction Over U.S. Personnel"
(e) SECNAVINST 5820.4G/AR 27-50/AFR 110-12, "Status of Forces Policies, Procedures, and Information," 14 January 1990
(f) Italian Code of Penal Procedure (*Codice di Procedura Penale*)("CPP"), D.P.R. No. 447, 22 September 1988, and subsequent amendments¹
(g) Treaty Between the United States of America and the Italian Republic on Mutual Assistance in Criminal Matters, signed 9 Nov 82, entered into force 13 Nov 85

Encl: (1) Translation: *Circolare* issued by the Italian Government on 25 March 1957 (Ministry of Grace and Justice Circular No. 786/357, "Application of Article VII of the Convention of London, of June 19, 1951, Concerning the Status of NATO Forces") (with 1981 amendments)
(2) Translation: *Regolamento* issued by the Italian Government on 16 March 1957 (Presidential Decree 1666 of 2 December 1956, reprinted in No. 70 *Gazzetta Ufficiale della Repubblica Italiana*, 16 March 1957, "Approving the Regulations for the Implementation of Article VII of the NATO Status of Forces Agreement Signed in London on June 19, 1951")

¹ An unofficial English translation of the 1990 version of Italian Code of Penal Procedure, "USEUCOM Unofficial Translation, Italian Code of Criminal Procedure, 24 May 1990," is at Tab 6 to the USSSO Deskbook.

- (3) USSO ROME IT 141432Z FEB 03 (ITALY - SUBMISSIONS OF ASSERTIONS OF PRIMARY RIGHT TO EXERCISE JURISDICTION AND REQUESTS FOR WAIVER OF FOREIGN CRIMINAL JURISDICTION)
- (4) *Circolare* issued by the Italian Government on 1 June 1993 (Ministry of Grace and Justice Circular No. VV/649/91/AR-2988, "Article VII of the Agreement Regarding the Status of Forces of the Parties to the North Atlantic Treaty, Signed in Strasburg [sic] on 19 June 1951 and Relative Implementing Regolamento, Approved by Presidential Decree of 2 December 1956, No. 1666; Complaints Filed to This Ministry by the U.S. Sending State Office for Italy, Care of U.S. Embassy, Rome")

A. Cancellation. This instruction cancels and supersedes USSSOINST 5820.1C, dated 2 July 1998.

B. Purpose. This instruction prescribes the operating procedures in Italy implementing Article VII of the NATO SOFA. Article VII addresses criminal jurisdiction over U.S. personnel.

C. Applicability. This instruction applies to all U.S. personnel stationed, on temporary duty, or transient, in Italy.

D. Background

The NATO SOFA defines the legal status of U.S. personnel in Italy. The U.S. Senate limited the United States' participation in the NATO SOFA by the reservations set forth in enclosure (1) to reference (a). These reservations:

1. Impose on commanding officers a duty to:

a. Request a waiver of jurisdiction from the Italian Government when there is a danger that Italian penal proceedings will deny the accused the constitutional rights he would enjoy in the United States and the denial of those rights will prejudice the accused, and

b. Take specified action if such a waiver is refused.

2. Provide for the appointment of trial observers.

E. Explanation of Terms

1. U.S. Personnel. The term "U.S. personnel" includes:

a. Members of the "Force," as defined in Article I(a) of reference (b). Included are all active-duty U.S. servicemembers present in Italy pursuant to official orders and all active-duty U.S. servicemembers granted liberty or shore leave during a vessel's port call to an Italian port.

b. Members of the "Civilian Component," as defined in Article I(b) of reference (b). Included are civilian nationals of the United States, or another NATO state other than Italy, who are employed by the U.S. Forces in Italy.

c. "Civilian Personnel," as the term is defined in Annex A to the "Shell Agreement" (reference (c)). It includes civilian nationals of the United States, or another NATO state other than Italy, who are closely affiliated with, but not employed by, the U.S. Forces. Unless otherwise specified herein, the term includes DOD contractor employees.

d. "Dependents" of (a) and (b) above, as the term is defined in Article I(c) of reference (b), and family members of the personnel listed at (a)-(c) above who are entitled to a DD Form 1173, Uniform Services Identification and Privilege Card.

e. All U.S. servicemembers assigned to duty in another NATO country or assigned to a NATO mission in a non-NATO country, and who are present in Italy pursuant to properly authorized leave, liberty, or pass.

2. Designated Commanding Officer (DCO)

a. The DCO is the Deputy Commander, U.S. Naval Forces, Europe (Deputy COMUSNAVEUR).

b. The DCO is appointed by the Commander, USEUCOM, as his representative in Italy and is responsible for implementing DOD and USEUCOM policies and procedures on the exercise of foreign criminal jurisdiction (FCJ) over U.S. personnel in Italy.

3. U.S. Country Representative, Italy (USCR)

a. The USCR, Italy, is the Officer-in-Charge, U.S. Sending State Office (OIC, USSSO).

b. The USCR is the only authorized point of contact with the U.S. diplomatic mission in Italy and with Italian national authorities regarding the exercise of Italian criminal jurisdiction over U.S. personnel.

4. Country Liaison Agent (CLA). The CLA is a senior commander appointed by the component commander to act as the liaison agent for their respective branches of service in Italy. Reference (d) pertains.

a. CLAs:

(1) Serve as the central points of contact for their services with the USCR and DCO,

(2) Monitor FCJ cases and issues involving personnel of their respective services,

(3) Ensure their component commanders are kept informed of FCJ cases and issues,

(4) Arrange for retention of defense counsel and payment of expenses in FCJ cases, and

(5) Perform other FCJ functions as required.

b. CLAs for Italy are:

(1) Army: Commander, U.S. Army Southern European Task Force (Airborne)(USASETAF(A)), ATTN: Staff Judge Advocate, AESE-JA, Unit 31401, Box 7, APO AE 09630, DSN 634-7717/7818, COM (0444) 51-7717/7818. Message Address: CDRUSASETAF(A) VICENZA IT//AESE-JA//.

(2) Navy and Marine Corps: Commanding Officer, Trial Service Office, Europe and Southwest Asia (TSO EURSWA), PSC 810, Box 8, FPO AE 09619-0500, DSN 625-4716/4409/4770, COM (081) 724-4716/4409/4770. Message Address: TRISVCOFF EURSWA NAPLES IT//.

(3) Air Force: Commander, 31st Fighter Wing, ATTN: Staff Judge Advocate, Unit 6140, Box 115, APO AE 09601-0115, DSN 632-7843/7844, COM (0434) 66-7843/7844. Message Address: 31 FW AVIANO AB IT//JA//.

5. Cognizant Military Authority (CMA)

a. CMAs and their area of responsibilities are listed below.

b. CMAs are authorized to:

(1) Submit requests for waiver of criminal jurisdiction;

(2) Receive communications from Italian judicial officials;

(3) Issue formal statements/certifications as to official duty status; and,

(4) Receive notices of arrests of U.S. personnel.

c. Areas of responsibility for the CMAs are:

(1) Commander, 31st Fighter Wing, Aviano: The region of Friuli-Venezia Giulia and the province of Belluno in the region of Veneto.

(2) Commanding General, USASETAF(A), Vicenza: The regions of Val D'Aosta, Piemonte, Lombardia, Emilia Romagna,

Trentino Alto Adige, Liguria, Toscana, Umbria, Marche, and all provinces in the region of Veneto, except Belluno.

(3) Commanding Officer, TSO EURSWA: The regions of Lazio, Abruzzi, Molise, Campania, Puglia and Basilicata, and the province of Cosenza in the region of Calabria.

(4) Commanding Officer, NAS, Sigonella: All provinces of the region of Calabria, except Cosenza, and all provinces in the region of Sicilia.

(5) Commanding Officer, NSA, La Maddalena: The region of Sardinia.

d. By separate agreement, CMAs may make specific exceptions to the geographic areas of authority described above, and notify USSSO of any such exceptions.

e. CMAs should maintain close communication with local Italian officials concerned with the exercise of FCJ to facilitate compliance with this instruction.

f. When the CMA is responsible for a case of an individual for whom the CMA is not the CLA, the CMA will keep the CLA updated on all case developments. The CLA will fulfill the reporting requirements under this instruction and references (d) and (e).

6. Component Commander. The Component Commander, the theater-level commander for each service, is: Commander, USNAVEUR, for Navy and Marine Corps personnel; Commanding General, USAREUR, for Army personnel; and Commander, USAFE, for Air Force personnel.

F. Policy. DOD policy is to protect, to the maximum extent possible, the rights of U.S. personnel who may be subject to the exercise of criminal jurisdiction by foreign courts and imprisonment in foreign prisons. At the same time, our FCJ policy must promote friendly relations, encourage mutual cooperation, and maintain a climate favorable to the accomplishment of our mission. CMAs should seek to maximize criminal jurisdiction over U.S. personnel in a manner that is least disruptive to relations with Italy.

1. In keeping with this policy, U.S. military authorities should, whenever possible and appropriate, discipline personnel who have violated the laws of Italy.

2. U.S. military authorities must take prompt and appropriate action when Italian authorities release criminal jurisdiction back to the United States as a result of a request for waiver of jurisdiction.

G. Training. Immediately upon arrival in Italy, U.S. personnel will receive training by their commands on the following provisions of the NATO SOFA:

1. Article VII, that provides the right of Italian authorities to exercise criminal jurisdiction over U.S. personnel in many instances.

a. Remind U.S. personnel that they are not immune from Italian prosecution solely because of their status under the NATO SOFA or separate bilateral agreements.

b. Inform U.S. personnel of their rights and duties under the NATO SOFA and the possible consequences of their failure to observe Italian laws.

2. The requirement for U.S. personnel to report immediately to their commanders any incident involving foreign nationals, Italian police, or judicial authorities.

3. The requirement for U.S. personnel to report immediately to their commanders the receipt of any summons, subpoena, or request to appear before an Italian criminal tribunal, police official, or investigative magistrate.

H. Terms and Definitions

1. An incident is any act or omission by U.S. personnel that affects Italian interests and could result in any involvement with Italian criminal proceedings.

2. The term proceeding includes apprehension, arrest, detention, confinement, service of criminal process, pretrial investigation, trial, post-trial proceedings, appeal, service of sentence, and any order of an Italian authority related to such criminal proceedings.

3. A serious or unusual incident occurs whenever:

a. Italian authorities place U.S. personnel in pretrial confinement;

b. When U.S. personnel commit an offense for which an Italian court would normally impose a sentence of unsuspended imprisonment;

c. Italian authorities actually or allegedly mistreat U.S. personnel;

d. Actions of U.S. personnel have generated or may generate publicity adverse to the United States;

e. Actions of U.S. personnel have aroused or may arouse Congressional or other U.S. domestic or foreign public interest; or,

f. Actions of U.S. personnel have resulted in death, serious personal injury, or extensive property damage.

I. Reporting Requirements for Serious or Unusual Incidents

1. Unit commanders. The unit commander has the primary responsibility to safeguard the legal rights of persons in the command when such persons are involved in incidents. Unit commanders (or CMAs acting on their behalf) immediately will report serious or unusual incidents to the CLA responsible for the accused:

a. Submit these reports by the fastest electronic means using the format that is prescribed in service and component directives. Telephonic and/or email notice strongly is encouraged.

b. Provide electronic copies of the report to:

(1) USSSO (USSO ROME IT//OIC//);

(2) the CMA;

(3) For Air Force and Navy personnel, the chain of command; and,

(4) For Air Force personnel, the Staff Judge Advocate, USAFE.

c. As new developments arise, follow initial reports with timely and complete supplemental reports. Navy commanders should submit supplemental reports on a monthly basis.

2. CLAs

a. CLAs will report all serious or unusual incidents to the Judge Advocate General of the service concerned following references (d) and (e), this instruction, and service directives.

b. CLAs will provide copies of these reports to:

(1) USSSO;

(2) DCO;

(3) USEUCOM;

(4) Component commander of the individual concerned;

(5) CLA for the service of the individual concerned (if different from the reporting CLA); and,

(6) For Navy personnel, the chain of command.

3. Reporting Requirements for Minor Incidents

a. Incidents that are not described in paragraph H.3., *supra*, are minor incidents.

b. Unit commanders will report to USSSO:

(1) Minor incidents to the extent required by service or command policies.

(2) Such incidents that, in the opinion of the CLA or CMA, the USSSO or other Embassy office should be aware.

(3) Minor incidents will be reported to USSSO when required by USSSO's claims instruction, USSSOINST 5800.1 series.

4. TDY/TAD Personnel and Personnel From Geographically Separated Commands

a. For incidents involving U.S. personnel who are geographically separated from their commands and the command cannot comply with this instruction, the CMA of the unit closest to the incident will assume responsibility for the case.

b. The CMA will notify the parent/sponsoring commander of the incident and inform the commander that the CMA has assumed responsibility for the purposes of this instruction.

c. When the incident comes to the attention of the parent/sponsoring commander first, the commander will contact the CMA of the unit closest to the incident and the CMA will assume responsibility for the case.

5. Afloat Personnel. When operational requirements of a ship impact compliance with this instruction, the commanding officer of the ship should refer the matter to the CMA and the TSO EURSWA.

J. Service of Foreign Criminal Process

1. Unit commanders and CMAs should assist and cooperate with Italian authorities attempting to serve criminal process on U.S. personnel.

2. Unit commanders or CMAs cannot serve process on an accused.

3. As required by enclosure (3), Italian authorities must provide a copy of the process to the unit commander. The unit

commander will notify his CMA to determine whether Italian authorities properly are exercising jurisdiction.

4. CMAs and unit commanders will furnish the accused an English translation of the document.

K. Determining Criminal Jurisdiction

1. Responsibility

a. When an incident occurs, unit commanders will refer the matter to the CMA.

b. The CMA will determine:

(1) Whether the United States or the Government of Italy has exclusive jurisdiction, or

(2) Whether the United States or the Government of Italy has the primary right of jurisdiction in a concurrent jurisdiction case.

2. United States or Italian Jurisdiction

a. United States has Exclusive Jurisdiction: When only U.S. law (the UCMJ or an extraterritorial provision of the U.S. Code not covered by Italian law) is violated.

b. United States has the Primary Right of Jurisdiction in a Concurrent Jurisdiction case: When an offense committed by U.S. military personnel is committed:

(1) Solely against the property or security of the United States;

(2) Solely against the property or person of U.S. personnel; or,

(3) In the performance of official duty.

c. Italy has Exclusive or Primary Right of Jurisdiction in Concurrent Jurisdiction Case: Over all other offenses against Italian law committed by U.S. personnel.

L. Procedural Requirements

1. U.S. Jurisdiction

a. The CMA will send all assertions of jurisdiction and requests for waiver of jurisdiction to the USSSO OIC for review and approval before such assertions and requests are filed with Italian authorities.

(1) Assertions. Following USSSO OIC approval, the CMA will file immediately the assertion via the appropriate *Procura Distrettuale della Repubblica* and addressed to the MOJ. A "blind" copy will be sent to the accused's Italian defense attorney for information only. The assertion will include the court docket number or, if a court docket number has not been assigned to the case, the criminal investigation number.

(2) Requests for Waiver of Jurisdiction. Filing procedures for requests for waiver of jurisdiction are the same as for assertions; however, requests are to be filed only after a court docket number has been assigned to the case. MOJ cannot consider a request for waiver if it has been filed after the accused has been served a summons to trial.

b. CMAs will send copies of all filed assertions and waiver requests to USSSO within two (2) business days of filing with local Italian authorities.

c. If the Italian prosecutor neither questions the U.S. assertion of jurisdiction nor requests a waiver of primary jurisdiction, the unit commander should take appropriate disciplinary action without delay.

2. Italian Jurisdiction

a. U.S. authorities will not make any criminal disposition of a case in which Italy has the primary right of jurisdiction, until either Italian authorities waive such right or the OIC, USSSO, approves such action.

b. Unit commanders of U.S. military personnel pending the exercise of Italian criminal jurisdiction may however, without application to USSSO, exercise nonjudicial punishment authority to the extent permitted by their service regulations.

(1) Nonjudicial punishment is appropriate when:

(a) It is unlikely that the offender will ever be subjected to actual punishment by the Government of Italy,² and

² These are situations where punishment by Italian authorities is unlikely:
(a) When the offense is one for which MOJ routinely grants waiver requests,
(b) When the offense is subject to an Italian amnesty (granted from time-to-time by the Government of Italy through legislation), or
(c) When the offense is one for which, under the circumstances of the case, the Italian court involved normally suspends all punishment.

(b) The needs of military discipline are not otherwise satisfied under the circumstances of the case. ³

(2) If an accused declines nonjudicial punishment, commanders must obtain approval from the OIC, USSSO, before preferring court-martial charges.

3. When Jurisdiction is Disputed

a. The CMA must contact the USSSO immediately when Italy claims exclusive or primary jurisdiction and the CMA disagrees.

b. When Italian authorities seek to request a waiver of the United States right to jurisdiction, the CMA will report that fact, together with all pertinent details, to USSSO for determination of appropriate action.

c. In the interim, the servicemember's chain of command will suspend all judicial or nonjudicial proceedings until the matter of jurisdiction or waiver is resolved. This does not preclude investigation of charges or other appropriate administrative action.

M. Availability of Personnel in U.S. Custody or Control

1. In the absence of some overriding operational necessity, U.S. personnel within the Italian territory must be available to Italian authorities for non-custodial interrogation upon the request of the prosecutor, preliminary investigating judge, preliminary hearing judge, or competent Italian police authorities.

2. U.S. officials will not deliver U.S. personnel who are in their custody or control to Italian custody unless the prosecutor or judge makes a specific request for such custody. The request must follow:

- a. The preferral of formal charges, and
- b. The prosecutor's investigation.

³ Unit commanders should consider whether the following satisfies the needs of military discipline in a particular case:

- (a) Confinement awaiting disposition of the case by Italian authorities,
- (b) Voluntary payment of damages by the accused,
- (c) Involuntary payment of damages pursuant to Article 139, UCMJ
- (d) Loss of some other appreciable right or benefit sufficient to indicate that the accused has already been "punished" for the offense.

3. U.S. personnel must refrain from any official action that would initiate a situation which might result in confinement of U.S. personnel in Italian jails or adversely affect command disciplinary action. This does not preclude:

a. An individual acting in a personal capacity who seeks the assistance of Italian authorities, or

b. Official actions such as military criminal investigations or crime prevention programs conducted unilaterally or in conjunction with Italian authorities in accordance with the Article VII(6) of reference (b).

N. Release of Military Personnel from Italian Custody

1. Outright Release. The CMA will attempt, at the local level, to secure the release of all accused military personnel from Italian custody until completion of Italian judicial proceedings, including appeals.

2. Transfer of Military Personnel to U.S. Authorities in Italy. If Italian officials deny outright release without restriction, the CMA should request that the accused be transferred to U.S. authorities. The CMA or a member of the chain of command may assure Italian prosecutors or other appropriate judicial and police authorities that the accused will not be removed from Italy without notice and an adequate opportunity for Italian authorities to object.

3. Removal of U.S. Military Personnel From Italy. After the United States formally has assumed the custody of U.S. military personnel and has agreed to make such personnel available for trial, the United States will not remove the servicemember from Italy, except:

a. After providing USSSO with telephonic notice of the potential transfer, and

b. After providing the Italian prosecutor written notice and an adequate opportunity to object to such removal.⁴

4. Pretrial Restraint. A commander may impose pretrial restraint on a military accused to ensure the accused's presence at trial or other proceedings on Italian charges.

a. Statutory and Regulatory Compliance. The restraint must comply with the Manual for Courts-Martial and command policies. Usually, however, restriction to the limits of a

⁴ U.S. military commands are not required to notify prosecutors of the departure from Italy of servicemembers who are criminally charged but not subject to pretrial confinement or restriction upon their liberty.

military installation will meet the command's needs and be acceptable to the cognizant Italian officials.

b. Status of Military Personnel. The commander must ensure that the servicemember does not remain under pretrial restraint beyond the end of his term of obligated service. If the servicemember is approaching the end of obligated service:

(1) The CMA should inform the Italian prosecutor of that fact and request permission for the servicemember to leave Italy.

(2) If the request is denied, the unit commander should, in accordance with service regulations, seek the servicemember's consent to a voluntary extension of military service.

(3) When such consent is refused, the CMA should notify the Italian prosecutor of that fact and take steps to have the servicemember involuntarily extended.

(4) When an involuntary extension is not possible, the CMA must notify the Italian prosecutor that a transfer and removal from Italy is imminent.

O. Release of Civilian Component Personnel, U.S. Civilian Personnel, and Dependents From Italian Custody

1. CMAs should attempt to secure the release of U.S. civilian employees and dependent family personnel from Italian pretrial confinement.

2. The CMA should inform the Italian prosecutor and other appropriate Italian officials that the United States can neither restrain the liberty of civilian employees and dependent family personnel nor guarantee their presence at trial.

3. The CMA may make a pledge that the United States will not remove the accused from Italy at U.S. Government expense without the prior approval of the Italian government.

4. When seeking removal of restrictions on the accused's liberties, the accused may voluntarily surrender his passport to the local *Questura* to evidence the intent to remain in Italy pending disposition of charges or action by Italian officials.

P. Bail

1. Appropriated funds can be used for bail; however, reference (e) precludes using such funds for the payment of fines or civil penalties.

2. CMAs or unit commanders must obtain assurances from Italian officials prior to using appropriated funds to post bail, that any bail paid will not be used to guarantee the payment of fines or civil penalties.

Q. Danger of Unfair Trial

1. Action by CMAs/CLAs. When it appears probable that the United States will not obtain release from custody or waiver of jurisdiction, and the accused may not receive a fair trial or fair treatment before, during, or after trial, the CMA or the CLA will contact the USSSO and provide:

- a. The full facts of the case with recommendations, and
- b. Any written communications furnished to the DCO, the CLA, and the component commander of the accused.

2. Unfair Trial Defined. A criminal judicial proceeding in an Italian court in which:

- a. The accused is not afforded the procedural rights, privileges and protections that are guaranteed by applicable international agreements (e.g., Article VII(9) of reference (b));
- b. The accused prejudicially is denied any of the substantive rights and/or procedural safeguards guaranteed by the U.S. Constitution in criminal proceedings in the state courts of the United States, including those fair trial rights listed at enclosure (1) to reference (a); or,
- c. The accused is not afforded the substantive rights or procedural safeguards to which local nationals are entitled under local law or practice.
- d. A trial is not unfair solely because it is not conducted in an identical manner to trials held in the United States.

3. Fair Treatment Defined. Treatment in which rights, privileges and protections substantially are equivalent to those afforded persons in the custody of U.S. military authorities, and not less than those afforded local nationals under local law and practice.

R. Prior Jeopardy

1. Prior Disposition by U.S. Authorities. CMAs will notify the USSSO immediately if Italian judicial authorities attempt to exercise criminal jurisdiction over offenses by U.S. personnel for which U.S. military or civil authorities have already exercised criminal jurisdiction.

2. Prior Trial by Italian Authorities. Unit commanders will not, without the prior approval of the CMA and the component commander of the accused, institute disciplinary measures other than nonjudicial punishment when Italian authorities previously have exercised criminal jurisdiction.

S. Transfer Upon Release or When Not in Italian Custody

1. Military Personnel

a. Military personnel who are released from Italian custody pending completion of Italian proceedings against them, or who are accused but have not been placed in Italian custody, may be transferred out of Italy provided:

(1) The release from Italian custody has not been obtained on the basis of a U.S. commitment to produce the accused for a personal appearance at some future time; and,

(2) The servicemember has been advised that he may be tried in absentia, has signed a written acknowledgment of trial rights, and has elected domicile (*elezione di domicilio*) for service of process purposes.

(a) The servicemember will be advised, in writing, of his or her obligation to inform the legal office responsible for monitoring the case of any subsequent change of address for notification purposes.

(b) If the servicemember will be represented at U.S. Government expense, all necessary powers of attorney will be completed prior to the servicemember's departure from Italy, to include a special power of attorney in favor of the retained Italian attorney.

b. Army military personnel involved in serious offenses will not return to the continental United States without prior authorization of HQDA (DAJA-IO).

2. Civilian Component, Civilian Personnel, and Dependents

a. If otherwise authorized by U.S. statute and regulations, the United States may provide transportation to a member of the civilian component, civilian personnel, and dependents under the same criteria as in paragraph S.1., *supra*.

b. If the case does not meet the above criteria, but the accused intends to leave Italy before final action by Italian authorities, the CMA or CLA will notify USSSO immediately.

3. Inadvertent Departures. If personnel transfer before military authorities know of an alleged offense, and if Italian authorities intend to prosecute the offense, the CMA will notify immediately:

- a. the accused,
- b. USSSO, and
- c. the CLA

4. Legal Hold. The use of legal hold is not justified unless a personal precautionary measure is imposed in accordance with reference (f). Generally, Italian authorities do not place restrictions on the removal of an accused from Italy.

T. Exclusive U.S. Jurisdiction Cases

1. CMAs will notify in writing the appropriate Italian prosecutor of an exclusive U.S. jurisdiction case only if the prosecutor inadvertently has opened an investigation into the case. Copies of the letter may be given to other Italian judicial and police officials as required by the circumstances.

2. Article VII(6)(b) of reference (b) and paragraph I of enclosure (1) provide authority for Italian judicial and police officials to transfer Italian investigative and judicial records to U.S. military authorities in exclusive U.S. jurisdiction cases.

U. U.S. Primary Right (Concurrent Jurisdiction) Cases

Enclosure (3) sets forth requirements for submitting assertions of primary right to exercise jurisdiction and requests for waiver of foreign criminal jurisdiction.

1. Notification. The CMA will send all assertions of jurisdiction and requests for waiver of jurisdiction to the USSSO OIC for review and approval before such assertions and requests are filed with Italian authorities.

a. Assertions. Following USSSO OIC approval, the CMA will file immediately the assertion via the appropriate *Procura Distrettuale della Repubblica* and addressed to the MOJ. A "blind" copy will be sent to the accused's Italian defense attorney for information only. The assertion will include the court docket number or, if a court docket number has not been assigned to the case, the criminal investigation number.

b. Requests for Waiver of Jurisdiction. Filing procedures for requests for waiver of jurisdiction are the same as for assertions; however, requests are to be filed only after a court docket number has been assigned to the case. MOJ cannot consider a request for waiver if it has been filed after the accused has been served a summons to trial.

c. CMAs will send copies of all filed assertions and waiver requests to USSSO within two (2) business days of filing with local Italian authorities.

2. Transfer of Records. Article VII(6)(b) of reference (b) and paragraph III of enclosure (1) provide authority for Italian judicial and police officials to transfer Italian investigative and judicial records to U.S. military authorities in U.S. primary right (concurrent jurisdiction) cases.

3. Official Duty Cases

a. It is U.S. policy not to waive the U.S. primary right to exercise criminal jurisdiction in a concurrent jurisdiction case under Article VII(3)(a)(ii) of reference (b) where a servicemember's official duty status is clear.

b. Guidance on official duty determinations from the USSSO is required.

4. Administrative Traffic Offenses

a. CMAs are not authorized to assert U.S. primary jurisdiction for administrative traffic offenses punished through fines where a servicemember, through his own negligence or willful misconduct, violated an Italian traffic law for which no penal sentence is possible.

b. CMAs may assert primary jurisdiction if the offense was based on the actions of another individual and the driver was otherwise in the performance of official duty.

5. Civilian Component, Civilian Personnel or Dependents. As the United States does not exercise military jurisdiction over civilians, assertions of U.S. primary criminal jurisdiction in concurrent jurisdiction cases for offenses allegedly committed by civilians will not be made.

V. U.S. Requests for Waiver of Italian Criminal Jurisdiction

1. When to Request. CMAs generally will file requests for waiver of Italian jurisdiction in cases involving U.S. military personnel in which the primary right to exercise jurisdiction in concurrent cases is vested in the Italian government.

2. When Not to Request a Waiver. CMAs should not file requests for waivers:

a. When the offense is one within the exclusive jurisdiction of Italy, unless prior express written approval is granted by the OIC, USSSO.

b. Before Italian authorities have initiated criminal charges;

c. When the case could go to trial immediately under Italian law if no waiver is requested, use of immediate trial procedure (*giudizio direttissimo, giudizio immediato*, etc.) is probable, the sentence adjudged either could not or probably will not include confinement, and such procedure would be in the best interest of the United States; or,

d. When the offense is one within the exclusive or primary jurisdiction of the United States as defined in subparagraph K.2., *supra*.

3. Civilians. The United States does not now exercise military criminal jurisdiction over civilians; therefore, requests for waivers will not be made.

4. Procedure for Requesting a Waiver. Enclosure (3) sets forth requirements regarding submitting assertions of primary right to exercise jurisdiction and requests for waiver of foreign criminal jurisdiction.

a. Notification. The CMA will send all requests for waiver of jurisdiction to the USSSO OIC for review and approval before such requests are filed with Italian authorities.

b. Filing. Following USSSO OIC approval, the CMA will file immediately the request for waiver via the appropriate *Procura Distrettuale della Repubblica* and addressed to the MOJ. A "blind" copy will be sent to the accused's Italian defense attorney for information only. Requests are to be filed only after a court docket number has been assigned to the case.⁵

⁵ In cases involving death, serious injuries and/or significant property loss, local prosecutors and senior MOJ officials have expressed repeated concerns that the granting of U.S. waiver requests leave injured parties without the ability to timely obtain adequate compensation through the filing, or threat of filing, parallel civil claims. USSSO recommends that in such cases a copy of the filed waiver request be delivered in person by an appropriate CMA representative to the local prosecutor. At that time, the CMA representative should explain all compensation schemes that may be available in the case, including:

(1) an *ex-gratia* award under Article VIII, paragraph 6 of the NATO SOFA;

(2) a claim under Article 139, Uniform Code of Military Justice;

(3) direct compensation by the servicemember, if any payments or offers of payment have already been made by the servicemember; and,

(4) compensation available from the servicemember's third-party liability insurer or other third-party payor as part of a pretrial settlement.

MOJ is more likely to grant U.S. waiver requests in cases involving personal injury or loss or damage to property where Italian national victims formally have indicated no interest in the alleged crimes being prosecuted in Italian courts and no interest in bringing civil actions against the alleged

c. CMAs will send copies of all filed assertions and waiver requests to USSSO within two (2) business days of filing with local Italian authorities.

5. Timely Filing of Requests by U.S. Authorities

a. If a request for waiver of jurisdiction is timely filed and the court schedules a hearing before action by MOJ, the defense attorney for the accused should be so notified.

b. MOJ cannot accept requests for waiver of jurisdiction after the accused has been served a summons to court for the first hearing. Therefore, CMAs must submit such requests promptly.

c. Since implementation of the new Italian CPP, reference (f), some commands have not received notification of investigation or notification of charges until after service of the summons to court for the first hearing.⁶ Lack of timely information can result in servicemembers being tried in Italian courts even in cases where MOJ routinely grants waiver requests⁷.

6. Obtaining Information From Italian Authorities. CMAs will take the following action when Italian judicial authorities do not provide information in a timely manner:

a. Review the general register (*registro generale delle notizie di reato*) at the prosecutor's office for notice of

wrongdoers in Italian courts. To this end, when possible, approach the injured party or, if represented by counsel, his or her attorney, and explain the potential advantages of proceeding with their monetary claims outside the Italian court system. If the injured party no longer wishes for the case to proceed in Italian court, have the injured party sign the following statement: "*Dichiaro di NON avere interesse a costituirmi parte civili e sono indifferente alla rinuncia della giurisdizione da parte delle Autorita' italiane.*" (Translation: I hereby state I am NOT interested in starting a legal action and that I am indifferent if jurisdiction is renounced by Italian authorities.) This statement should then be filed along with the U.S. waiver request at the time the waiver request is delivered to the cognizant Italian prosecutor or as soon as possible thereafter.

⁶ Depending on the type of violation allegedly committed, a preliminary hearing may be held before the summons to court for the first hearing is issued. Under Article 424, *et seq.*, of the Italian CPP, a preliminary hearing ends with the judge's decision to either acquit (*e.g., non luogo a procedere*) or hold the accused over for trial (*e.g., rinvio a giudizio*). The decision is read at the end of the hearing, and is equivalent to the summons to court. Absentee accused must then still be served, but service can be made up to twenty (20) days before the trial date. Consequently, a waiver request, if not filed previously, should be filed at the preliminary hearing.

⁷ On 1 June 1993, MOJ issued a *circolare* to all Prosecutors of the Courts of Appeal (Enclosure (1)) reminding them to follow NATO SOFA provisions pertaining to criminal jurisdiction.

offense recordings (*iscrizione nel registro delle notizie di reato*);

b. Whenever a penal action may be forthcoming, check with local police authorities who have investigative jurisdiction over the incident. The inquiry should refer to any complaints filed and request information as to which prosecutor's office is handling the case.

c. The CMA should file the request for waiver of jurisdiction with the prosecutor as soon as penal proceedings are underway (*iscrizione nel registro delle notizie di reato* or *iscrizione nel registro degli indagati*).

d. To obtain timely notice of charges, CMAs must establish, cultivate and maintain strong working relationships with prosecutors and clerks at the *Procura della Repubblica*. At the same time, military law-enforcement offices should promote and nurture strong working relationships with local law-enforcement authorities

7. Action When A Waiver Request is Granted

a. USSSO notifies the CMA when the General Directorate Penal Affairs, MOJ, issues the waiver of jurisdiction.

b. Military commanders will then take whatever disciplinary or other action is appropriate without delay.

c. CMAs will report case disposition information to USSSO in cases when MOJ requests case disposition information and when MOJ grants a U.S. waiver request against the recommendations of the prosecutor and/or the Ministry of Foreign Affairs. Reports of case disposition will include:

(1) Date and type of proceeding;

(2) Summary of the offenses or misconduct considered by the proceeding;

(3) Summary of the findings of the proceeding; and,

(4) Any administrative and/or disciplinary action ordered.

8. Action When a Waiver Request is Denied. If MOJ denies a U.S. request for waiver of jurisdiction, the CMA will inform USSSO of developments and the conclusion of the case. No

particular format is required although a DD Form 1936 may be used for such reports.

W. Requests For Payment of Attorney Fees and Trial Expenses by Military Personnel

The United States may pay attorneys' fees and trial expenses in Italian criminal cases at the trial and appellate levels if the accused is, at the time he makes the request, subject to the UCMJ.

1. The United States may pay fees and expenses in any of the following circumstances:

a. When the act complained of occurred in the performance of official duty;

b. When the sentence for the charged offense normally includes confinement, whether such sentence is suspended;

c. When the case is on appeal from any proceeding in which there appears to have been a denial of the substantial rights of the accused;

d. When conviction for the offense alleged could later form the basis for administrative discharge proceedings for misconduct as a result of civil court disposition; or,

e. When the case may substantially affect relations between the U.S. Forces and the Government of Italy, or may otherwise adversely affect U.S. interests.

2. CMAs and unit commanders should direct requests for counsel and payment of defense expenses arising out of Italian criminal prosecutions to the appropriate CLA.

3. The requirement set out in reference (d) for coordination with and approval by the USCR (OIC, USSSO) before retention of private defense counsel on behalf of U.S. servicemembers is hereby waived.

4. The DCO and USSSO will be information addressees on any electronic messages requesting counsel and payment of defense expenses, and will be provided copies of any other written requests.

X. Requests For Payment of Attorney Fees and Trial Expenses by U.S. Civilians

1. The United States may pay attorney fees and trial expenses for members of the civilian component in either criminal or civil Italian court cases arising out of the performance of official duties.

2. For all other cases involving U.S. civilian personnel, to include command-sponsored dependents of U.S. servicemembers and U.S. civilian personnel, the U.S. may, pursuant to 10 U.S.C. 1037, pay attorney fees and expenses. Requests shall be processed under references (d) and (e) and service regulations.

3. The United States will not pay attorney fees and trial expenses for DOD contractors ("technical representatives") and their employees, and for non-command sponsored dependents.

4. The requirement set out in reference (d) for coordination with and approval by the USCR before retention of private defense counsel on behalf of U.S. civilian personnel is hereby waived.

Y. Requests for Payment of Attorney Fees and Trial Expenses for Italian Employees

1. An Italian employee of the U.S. Forces acting within the scope of employment at the time of the incident is entitled to request free legal defense by the State Attorney's Office (*Avvocatura dello Stato*) in criminal or civil actions.

2. Supervisors should advise the employee to request this representation. Requests are made, on plain paper, to *Avvocatura Generale dello Stato*, Via dei Portoghesi, 12, 00186 Roma.

3. The employee's supervisor and commander of the activity where the employee is assigned should endorse the request.

4. The request and original writ of summons should be sent to the USSSO.

5. If the Italian employee retains private counsel, USSSO must be notified of the employee's decision.

Z. Rights Under the NATO SOFA

1. General Provisions. The NATO SOFA provides that, whenever a member of a force or civilian component or one of their dependents is prosecuted under the jurisdiction of a receiving State, the defendant is entitled to:

- a. A prompt and speedy trial;
- b. Be informed, in advance of trial, of the specific charge or charges made against him;
- c. Be confronted with the witnesses against him;
- d. Compulsory process for obtaining witnesses in his favor, if they are within the jurisdiction of the receiving State;

e. Legal representation of his own choice for his defense or to have free or assisted legal representation under the conditions prevailing for the time being in the receiving State;

f. Services of a competent interpreter, if the accused considers it necessary; and,

g. Communicate with a representative of the Government of the sending State and, when the rules of the court permit, to have such a representative present at his trial.

AA. Interpreters

1. Article 143 of reference (f) requires Italian courts to appoint interpreters at no cost for an accused who does not "know the Italian language."

2. CMAs, CLAs, and unit commanders may provide interpreters and translation services to the extent permitted by service regulations, command policies, and applicable Italian law when not provided by Italian authorities.

BB. Trial Observers

1. Appointment. The OIC, USSSO, appoints trial observers under authority delegated from the U.S. Ambassador to Italy. CMAs and CLAs will forward recommendations to USSSO to obtain such appointments.

2. Assignment

a. Lawyer Trial Observers. The CMA, CLA or unit commander will ensure that one or more lawyer trial observers, previously appointed by the OIC, USSSO, attend Italian court proceedings when U.S. personnel are tried in the following circumstances:

(1) For an offense which involves serious personal injuries or extensive property damage,

(2) For an offense which usually results in a sentence to confinement (suspended or not).

b. Prior Representation. Under no circumstances may a lawyer who has served previously in the capacity of trial counsel or counsel for an accused in a matter arising out of the same circumstances subsequently act as trial observer at a foreign trial of the same accused.

c. Preliminary Hearing Attendees

(1) U.S. military trial observers are prohibited under reference (f) from attending preliminary hearings.

(2) The accused's Italian defense counsel must attend the hearing.

(3) The CMA's Italian bar-member legal advisor should also attend, if permitted by the court.

d. Non-Lawyer Trial Observers

(1) In circumstances other than listed in paragraph BB.2.a, *supra*, the CMA, CLA or the accused's unit commander may assign a non-lawyer as a trial observer.

(2) Non-lawyer trial observer are permitted for trials *in absentia*.

e. Referrals. Pursuant to reference (d), unit commanders may look to CMAs to furnish trial observers in their designated areas.

3. Trial Observer Functions

a. Review the police reports and supporting documents to become thoroughly familiar with the facts in the case before the trial.

b. Attend the trial and all proceedings associated with it, and will note the progress of the trial and complete a formal report, as provided in paragraph BB.4., *infra*.

c. Immediately report by telephone or facsimile to USSSO and the CMA any violations of trial safeguards, as well as any discrimination against the accused based on race, creed, sex, color, or national origin.

d. Remind defense counsel before the hearing to request the court note the presence of the trial observer in the hearing minutes.

e. On request, the trial observer will assist the court and defense counsel in obtaining witnesses and evidence available from U.S. government sources.

f. The trial observer is not a member of the defense team. He does not sit at the defense counsel's table, and is not to interject himself into the trial proceedings

g. If the occasion necessitates and circumstances permit, the trial observer will advise the defense counsel of the rights of the accused under references (b) and (f), and enclosure (4).

h. Advise defense counsel should a U.S. request for waiver of jurisdiction be still outstanding.

i. Neither the trial observer nor other command representatives will perform translation services during Italian court hearings. See paragraph AA., *supra*.

4. Trial Observer Report. The trial observer will prepare a formal report of the trial and all appellate proceedings in accordance with the requirements set forth in reference (d). The report will assess whether there was any failure to comply with the procedural safeguards secured by the NATO SOFA and its implementing agreements, and whether the accused received a fair trial under all the circumstances.

a. Due date. The trial observer will complete and forward the report to USSSO not later than fourteen (14) days after the conclusion of the trial or appellate proceeding. The trial observer will not delay the report because of the possibility of subsequent proceedings.

b. Postponements

(1) No report is required when a court, either on motion of counsel or *sua sponte*, orders a delay in further proceedings so long as no other substantive business is conducted during the hearing.

(2) The hearing and the reasons for the postponement will be set out in the next submitted trial observer's report.

(3) Coordination should be made with the USSSO, whenever clarification of this policy is required.

c. Distribution. The trial observer, staff judge advocate, or, when applicable, the Commanding Officer, TSO EURSWA, will submit an original and six (6) copies of the report to USSSO through appropriate command or technical channels.

CC. Confinement Policy. The DOD seeks to ensure that foreign authorities treat U.S. military personnel fairly when in their custody. When U.S. military personnel are confined (pretrial, during trial, and post-trial) in foreign penal institutions, the DOD seeks to ensure that the prisoners experience the same treatment and enjoy the same rights, privileges and protections as personnel confined in U.S. military facilities. These rights include legal assistance, visitation, medical attention, food, bedding, clothing, and other health and comfort supplies. If the supplying of food stocks is not practical or economical, the unit commander may arrange for purchases on behalf of the prisoner from institution commissaries or other suitable sources. Service regulations may also authorize cash allowances (health and comfort pay) to servicemembers for such purchases.

1. Command Responsibilities

a. The unit commander is responsible for implementing DOD and service policies on confinement of U.S. personnel in foreign institutions.

b. The unit commander should contact the CLA for assistance.

c. The CLA will either provide the required services or have such services provided by the CMA closest to the place of confinement.

2. Visitation/Examination of Prisoners

a. By a Judge Advocate and Chaplain

(1) A judge advocate and a chaplain will visit U.S. personnel confined in an Italian penal institution:

(a) Not later than forty-eight (48) hours after initial confinement (or soon thereafter if Italian authorities do not allow visitation within the first 48 hours), and

(b) At least once each thirty (30) days thereafter.

(2) CMAs will provide the judge advocate/legal officer visitor within their areas of responsibility. Reference (d) pertains.

(3) These visits do not substitute for command representative visits required by other directives.

b. By Medical Personnel

(1) A physical examination will be administered within forty-eight (48) hours before a servicemember is surrendered to foreign authorities for confinement (pretrial, during trial, or post-trial). Reference (e) pertains.

(2) If a physical examination cannot be performed prior to confinement, arrangements will be made to accomplish it at the earliest possible time subsequent to confinement.

(3) A medical officer (physician, physician's assistant, or staff nurse) will visit U.S. personnel confined in a foreign penal institution:

(a) Within thirty (30) days after initial confinement, and

(b) At least once each ninety (90) days thereafter.

c. Service Affiliation. Judge advocates, chaplains, and medical personnel visiting incarcerated servicemembers normally will be of the same military service as the confinee.

d. Exceptions

(1) Only the DCO may approve requests for exceptions to the requirements of paragraphs CC.2., *supra*.

(2) Requests for exceptions are to be sent through appropriate command channels to the DCO via the OIC, USSSO, and the Fleet Judge Advocate, COMUSNAVEUR.

3. Permission to Visit Prisoners. Visitors will obtain permission from Italian authorities before visiting a prisoner.

a. Pretrial custody: the presiding judicial authority is the deciding official for such requests.

b. Post-trial confinement: the prison director is the deciding official.

c. Non-family visitors: requests may be required in advance of a prison visit to the prison's district inspector.

4. Report of Prison Visitation

a. An official visitor will prepare a report of each visit using DD Form 1602, "Report of Visit, US Personnel in Foreign Penal Institution." Report control symbols are: Army: JAG-59; Navy: NAVJAG 5820-2; Air Force: RSC:HAF-JAC (M 7104(DD)). The report will be submitted in duplicate to USSSO.

b. When a judge advocate makes a visit together with a chaplain and/or a medical officer, the judge advocate will submit the required report of visit for the team.

5. Prison Deficiencies

a. If a visitor notes any deficiency that endangers the physical, mental, or moral well-being of any prisoner, the deficiency will be reported immediately to both the CMA and the USSSO.

b. Follow-up visits will then take place not more than fifteen (15) days after noting the deficiency, and not less frequently than every 15 days thereafter until Italian authorities correct the deficiency.

6. Release from Italian Confinement

a. The CMA will obtain from Italian authorities the anticipated date of release of a prisoner. The CMA will arrange with Italian authorities for the delivery of the released prisoner to the appropriate command.

b. When a military prisoner is released, the unit commander will:

(1) Direct a complete physical examination, placing one copy of the examination report in the individual's service record and forward one copy to USSSO; and,

(2) Obtain a sworn statement, signed by the released prisoner, describing in detail the treatment he received during confinement, and forward a copy of the sworn statement through the CMA to USSSO within 48 hours after the prisoner's release from confinement.

c. Except as otherwise provided by reference (e), servicemembers serving post-trial confinement in Italian prisons will not be discharged or separated from the military until the completion of their confinement and their return to the United States.

7. Civilian Confinees

(a) Whenever possible, and even when the civilian confinees are not entitled to the same, commanders will ensure that all U.S. personnel in foreign custody or confinement receive the same treatment, rights and support that are extended to U.S. servicemembers.

(b) Commanders should contact U.S. consular officials to notify them of the confinement.

DD. Reporting Requirements

1. Status Reports. The CMA immediately will notify USSSO of any change in the status of any case previously reported to USSSO. This requirement is in addition to any other reporting requirements set out in this instruction or in reference (d).

2. Annual Reports

a. The CLA will prepare the annual report as required in reference (d) ("Exercise of Criminal Jurisdiction By Foreign Tribunals Over United States Personnel").

(1) The TSO EURSWA, will prepare the report for Navy and Marine Corps personnel;

(2) OSJA, USASETAF(A), will prepare the report for Army personnel; and,

(3) 31st Fighter Wing/JA will prepare the report for Air Force personnel.

b. These reports will be forwarded to USSSO for transmittal through the DCO (and, where appropriate, Army and Air Force component commands) to the respective Judge Advocates General.

EE. Cross-Servicing. With the exception of defense counsel and other associated fees, FCJ support (e.g., trial observers, prison visitations, etc.) will be provided on a non-reimbursable basis, even when the accused/confinee is not affiliated with the service which provides the support.

FF. U.S. Extradition Requests

1. Requests of U.S. federal and state authorities for extradition of U.S. personnel from Italy to the U.S. are not considered FCJ matters under the purview of this instruction.

2. A CMA, CLA, or servicing staff judge advocate may afford prisoner visitation and other assistance to individuals awaiting extradition to the United States to the extent allowed by 10 U.S.C. 1037, federal statutes and service regulations.

3. Advice on U.S. extradition requests should be obtained through service legal technical channels.

GG. Release of Evidence by Italian Authorities

1. When U.S. commands require evidence in the possession of Italian officials to successfully prosecute U.S. personnel, the CMA and military law enforcement should attempt to obtain release from Italian officials.

2. If such attempts fail, the matter should be referred to the USSSO.

3. Reference (j) provides a mechanism through which the U.S. Department of Justice can formally request MOJ to render assistance in criminal investigations and procedures, and to obtain needed assistance in courts-martial and other criminal prosecutions heard by U.S. courts.

4. The responsible agency at the U.S. Embassy for filing requests under reference (j) is the Department of Justice (DOJ) Attaché's Office, (06) 4674-2680. All potential requests for assistance to DOJ must first be coordinated with the USSSO.

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24 Oct 03

HH. Communication With the USSSO

All commanders, judge advocates and legal advisors are authorized to communicate directly with USSSO personnel via the following:

1. Commercial telephone: (39) 06-4674-2303;
2. Commercial facsimile: (39) 06-4674-2653;
3. DSN telephone: (314) 625-3146;
4. DSN facsimile: (314) 625-3157;
5. Electronic message address: USSO ROME IT//OIC//;
6. USPS address: USSSO PSC 59, Box 65, APO AE 09624; or
7. Italian mailing address: USSSO, c/o Ambasciata Americana, Via Vittorio Veneto, 119/A, 00187 Roma.

P. J. BATTIN